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12-CV-02091-M

AUG 01 2014

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

Honorable John C. Coughenour

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MARIA UCHYTIL, an individual, and
JEAN DeFOND, an individual, on behalf of
the United States of America,

Plaintiffs/Relators,

v.

AVANADE INC., a Washington
corporation, AVANADE FEDERAL
SERVICES LLC, a Delaware limited
liability company, and AVANADE
HOLDINGS LLC, a Delaware limited
liability company,

Defendants.

Case No.: 2:12-cv-002091 JCC

**RELATORS' *EX PARTE* MOTION
REQUESTING COURT'S GUIDANCE
ON DEALING WITH CONTESTED
CONFIDENTIAL AND PRIVILEGED
DOCUMENTS AND
COMMUNICATIONS**

Note for Consideration: August 1, 2014

Plaintiffs/Relators Maria Uchytel and Jean DeFond, by their undersigned counsel, file
this *ex parte* motion requesting the Court's guidance on the following issue:

Whether, how, and under what conditions may Relator Jean DeFond, a former in-house
attorney for defendant Avanade Federal Services, LLC ("AFS"), use and disclose documents and
communications in her possession, obtained during her employment with AFS, in support of
this Qui Tam action under the False Claims Act where there are disputed claims and potential
arguments that the documents and communications are privileged or confidential. More
specifically, can she provide those documents and communications to the United States to
assist the United States in its investigation to determine whether to intervene in this action?

EX PARTE MOTION - 1
Case No.: 2:12-cv-002091

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1 **I. FACTS AND BASIS FOR MOTION**

2 The following facts are based on the documents filed with the Court under seal and on
3 the attached sworn supporting declarations of Relator Jean M. DeFond ("DeFond Declaration")
4 and Relators' attorney Mark K. Davis ("Davis Declaration").

5 This case arises under the False Claim Act ("FCA"), 31 USC 3729-33, where the
6 Relators, acting on behalf of the United States and themselves, allege the defendants violated
7 the FCA by submitting or causing to be submitted false or fraudulent claims for payment in
8 connection with the sale, implementation, maintenance, repair, and service of computer
9 software known as the Task Management Tool ("TMT"). *Original Complaint, Dkt #1*. The
10 case has been filed under seal to give the United States time to consider whether to intervene.
11 The United States has commenced an investigation of defendants based on the allegations of
12 the complaint. The court has extended to August 1, 2014 the investigative period and the time
13 during which the case is under seal. *Davis Declaration at ¶ 8*. The United States will be
14 seeking a further extension. *Id.*

15 The original Relator, Maria Uchytel, was employed by defendant AFS in a number of
16 senior level positions. During the course of her employment, she learned of facts and obtained
17 documents that support her belief and allegations of fraud by defendants as set forth in the
18 Original Complaint. She provided key documents to the attorney for the United States as part
19 of a Disclosure Statement as required by the FCA. *Davis Declaration at ¶ 3; 31 U.S.C. §3730*.
20 She has been interviewed by the government and has been permitted by the court to
21 communicate the existence and prosecution of this action and to share a copy of the complaint
22 with Jean DeFond, another employee of AFS. *Order, Dkt. No. 7*.

23 Following the court's Order, Ms. DeFond was provided a copy of the complaint and
24 communicated with Ms. Uchytel and her undersigned attorneys. *Davis Declaration at ¶ 5;*
25 *DeFond Declaration at ¶ 61*. Based on information, facts and documents she possessed, Ms.
26 DeFond was able to corroborate the facts provided by Ms. Uchytel and to expand upon the

1 factual allegations contained in the original complaint. *Davis Declaration at ¶ 4; DeFond*
 2 *Declaration at ¶ 61.*

3 On June 9, 2014, a First Amended Complaint ("FAC") was filed under seal naming Ms.
 4 DeFond as an additional relator based on the original information she has regarding defendants'
 5 fraudulent actions gained during her employment with defendant AFS as Senior Director and
 6 Senior [in-house] Counsel.¹ Relators assert the additional limited documents and facts that can
 7 be provided by Ms. DeFond, as discussed by her in detail in her declaration, are not protected
 8 from disclosure by any claims of attorney-client privilege or confidentiality that have been or
 9 may be asserted by AFS or the other defendants.² *Davis Declaration at ¶¶ 6-7; DeFond*
 10 *Declaration at ¶ 25.* Relators have not yet provided a copy of the FAC to the United States,
 11 but have communicated to the U.S. attorneys that the FAC was filed and seeks to add Ms.
 12 DeFond as a relator. *Davis Declaration at ¶ 4.* For some time the United States has sought to
 13 interview Ms. DeFond and obtain access to information and documents in her possession that
 14 pertain to this action. *DeFond Declaration at ¶¶ 53-54.* Because of her concerns over the
 15 ethics of disclosing facts and documents, Ms. DeFond has not shared any documents with the
 16 government and will not do so unless and until the court grants her permission to do so in
 17 ruling on this motion. *DeFond Declaration at ¶ 49.*

18 At this early stage of the case, Relators are faced with competing duties and rights on
 19 which they seek the court's guidance. They have an obligation under the FCA to provide the
 20 government with pertinent information in support of their case and which they should have a
 21 right to use. Ms. DeFond also has an ethical obligation not to disclose facts and documents

22 ¹ In amending the FCA in 1986, Congress barred certain classes of persons from bringing actions, 31 U.S.C.
 23 §3730(e)(1)-(4), but lawyers are not among those barred. In choosing not to exclude lawyers, Congress made clear
 24 that lawyers are included in the universe of eligible qui tam relators. *U.S. ex rel Doe v. X Corp.*, 862 F.Supp. 1502,
 1506-1508 (ED Va. 1994).

25 ² Because of the page limitation for this motion, Relators have not discussed the applicable law that supports
 26 Relators' position. Relators are prepared to present whatever further briefing the court may request.

that are legitimately protected from disclosure by the attorney-client privilege or other grounds of confidentiality. In light of recent qui tam and other cases addressing the ethical and other issues arising out of disclosure of documents alleged to be covered by the duty of confidentiality and the attorney-client privilege,³ Relators are following the advice of the Ninth Circuit: “The path to ethical resolution is simple: when in doubt, ask the court.” *Gomez v. Vernon*, 255 F.3d 1118, 1135 (9th Cir. 2001). Counsel for the United States have been consulted regarding the filing of this motion and join in this request. *Davis Declaration at ¶¶ 2 & 8.*

III. OPTIONS FOR THE COURT’S CONSIDERATION

Counsel for the Relators have not found any Qui Tam cases that deal with the issue presented in this motion at this junction of the case – where the case is still under seal and the government is still investigating whether to intervene and seeks information in the possession of a relator that is contested as to privilege. In analogous cases involving claims of retaliatory termination of employment, courts have allowed in-house counsel plaintiffs to use confidential information to support their claims and have urged courts to employ “equitable measures” to protect client confidences. *General Dynamics Corp. v. Superior Court*, 876 P.2d 487, 504 (Cal. 1994)(noting the “use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successful proceedings, and, where appropriate, *in camera* proceedings”); *Fox Searchlight Pictures, Inc. v. Pladino*, 106 Cal.Rptr.2d 906, 919-20

³ *See, e.g., U.S. ex rel Hartpence v. Kinetic Concepts, Inc.*, 2013 WL 2278122 (CD Cal. 2013)(disqualifying relator’s counsel who obtained privileged documents from relator, gave them to the U.S. attorney who advised of privilege issues that attorney ignored and then quoted from the documents in amended pleadings and further failed to seek guidance from the court; the court noted in footnote 2: “The principle ‘when in doubt, ask the court’ applies with particular force when a qui tam action is under seal because counsel cannot reveal the lawsuit to defendant.”); *U.S. ex rel Fair Laboratory Practices Associates v. Quest Diagnostics Inc.*, 734 F.3d 154 (3rd Cir. 2013)(affirming disqualification of relators’ counsel and dismissal of qui tam suit filed by former general counsel and officers for violating state rules of professional conduct prohibiting use of confidential information by using that information beyond what was “necessary”). The facts are different in our case where Ms. DeFond has not disclosed any such confidential information and has an opinion from her ethics lawyer that disclosure under Washington’s RPC 1.6 is permitted. *DeFond Declaration at ¶¶ 49, 55, 59-60 and Ex. 5 thereto.*

(Cal.App. 2001)(extending *General Dynamics* to allow plaintiff to “disclose to her attorney all facts relative to the termination, including employer confidences and privileged communications,” but limiting the disclosures to “information [she] reasonably believe[s] is necessary to her attorney’s preparation and prosecution of the case.”)

The Ninth Circuit has followed this advice in permitting former in-house counsel to pursue claims of whistle-blower retaliation against their corporate employers arising from their alleged disclosures of shareholder fraud to the corporate general counsel. *Van Asdale v. Int’l Game Technology*, 577 F.3d 989, 995-96 (9th Cir. 2009)(quoting *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 182 (3rd Cir. 1997) (“we agree with the Third Circuit that the appropriate remedy is for the district court to use the many ‘equitable measures at its disposal’ to minimize the possibility of harmful disclosures”).

While these protective measures are often cited, few if any cases discuss how they were or are to be implemented in actual settings. Exploring virgin territory and making use of the suggestion that the court employ one or more “equitable measures” to balance the rights and obligation of Relators to provide information in support of their allegations to the Government with the rights of Defendants to maintain confidentiality of information, Relators suggest the following options for the Court’s consideration.

A. Hold a Pretrial Conference.

As a preliminary matter and before ruling on this motion, the court could order the attorneys for both the Relators and the United States to attend a pretrial conference under FRCP 16 conducted under seal to discuss the issues presented by this motion and possible resolution. *FRCP 16(c)(2)(L)* (“At any pretrial conference, the court may consider and take appropriate action on the following matters: ...adopting special procedures for managing potentially difficult ... actions that may involve complex issues .. [or] difficult legal questions...”). The proposed order attached hereto presents this option.

B. Enter a preliminary protective order.

1 The court could enter a preliminary protective order under the circumstances presented
 2 here to allow disclosure of certain key documents by Ms. DeFond to the government for the
 3 limited purpose of allowing the United States to continue its investigation. The proposed
 4 order attached hereto presents this option with some suggested language.

5 **C. Conduct an in camera inspection.**

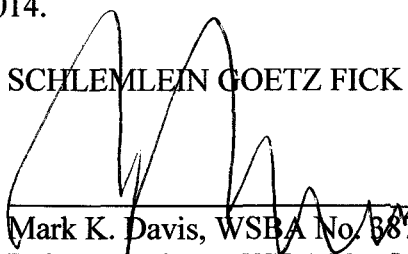
6 *Kerr v. U.S. District Court for No. Dist. Of Calif.*, 426 U.S. 394, 405 (1976) approves
 7 of the use of *in camera* inspections of alleged confidential communications as a “relatively
 8 costless and eminently worthwhile method to insure that the balance” between claims of
 9 privilege and claims of need for the documents “is correctly struck.” *In re Grand Jury*
 10 *Investigation*, 974 F.2d 1068 1074-75 (9th Cir. 1992) holds the two-step process established in
 11 *United States v. Zolin*, 491 U.S. 554, 565 (1989) applies equally well when a party seeks *in*
 12 *camera* review to contest assertions of privilege on grounds other than the crime-fraud
 13 exception. The movant seeking *in camera* review must merely satisfy the “minimal” threshold
 14 of providing a “factual basis adequate to support a good faith belief by a reasonable person”
 15 that the communications are not privileged.” *Id* at 1075. Relators assert that Ms. DeFond’s
 16 declaration satisfies that minimal showing. Once this minimal threshold is satisfied, the court’s
 17 discretion as to whether to order an *in camera* inspection is guided by the factors enumerated
 18 in *Zolin*. *In re Grand Jury Investigation* at 1075. If the court decides to conduct *in camera*
 19 review, however, and outright disclosure of the documents is requested, the court must allow
 20 the party seeking to preserve the privilege the opportunity to present evidence and argument in
 21 support of its claim of privilege. *In re Napster Inc. Copyright Litigation*, 479 F.3d 1078, 1093
 22 (9th Cir. 2007). The proposed order presents this option.

23 **IV. CONCLUSION**

24 Relators respectfully request the Court’s guidance on these matters and are prepared to
 25 provide any additional briefing, information or facts that might assist the Court in making its
 26 decision.

1 DATED this 1st of August, 2014.

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